

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

BRADLEY OLIVER BOWEN,	)
	)
Petitioner	)
	)
v.	) Crim No. 95-21-B
	)
UNITED STATES,	)
	)
Respondent	)

**ORDER**

Petitioner, Bradley Oliver Bowen, on August 28, 2000, filed a habeas corpus petition (Docket # 311) challenging his federal conviction pursuant to 28 U.S.C. § 2255, listing six grounds for relief.<sup>1</sup> After an extension for cause shown, the United States answered on October 12, 2000. (Docket # 314.) On October 16, 2000, Bowen filed a motion to amend the petition to "supplement the issues raised." (Docket # 315.)

Under the Federal Rules of Civil Procedure leave to amend after a responsive pleading has been filed must be "freely given when justice so requires." Fed. R. Civ. P. 15(a). Congress has expressly provided that this standard, operative in civil actions, applies to amendments to or supplementation of habeas applications. *See* 28 U.S.C. § 2242; *see also James v. Giles*, 221 F.3d 1074,1077-78 (9<sup>th</sup> Cir. 2000) (observing that Federal Rule of Civil Procedure 15(a) applies to habeas corpus actions just as it does to "garden variety" civil actions); *Scott v. Clark*, 761 F.2d 1524, 1527 (11<sup>th</sup> Cir. 1985) (*pro se* § 2255 petitioner's efforts to amend should have been permitted by the district court under Rule 15(a), even though the petitioner had not sought leave to

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1 Two of the six grounds in the initial petition are typed on an addendum sheet that is attached after the page on which Bowen signed the statutory alternative to the oath. Although far shy of a frontal attack, the United State's answer alludes to this sequence as if it is somehow out of synch with the oath requirements. Although at this point I make no determination as to the merits of these two grounds, I will treat the fifth and sixth grounds as sheltered by Bowen's

amend).

After review of the initial petition and offered amendment I conclude that Bowen is not attempting to "amend" his petition to, for instance, add or delete a ground for relief. Rather, I read the motion as proffering a supplementation of argument. The argument offered in the amendment addresses the fourth ground raised in Bowen's original petition, and also addressed in his reply to the United State's answer. (Docket #316.) The text is entirely legal argument and there is no need for further oath. Applying the liberal standard of Rule 15(a) in the context of a first petition for habeas relief,<sup>2</sup> I **GRANT** his unopposed<sup>3</sup> motion to supplement.

The fourth ground in Bowen's petition, as further addressed in his reply brief and motion to supplement, raises the question of whether the sentencing judge, and not the jury, can determine the quantity of the controlled substance in imposing a sentence for an offense when the quantity of the substance dictates under which subsection of the statute a defendant falls and thereby determines the statutory maximum sentence for the offense.

Responding to the fourth ground in its answer, the United States has recognized that Bowen is raising an *Apprendi v. New Jersey*, 530 U.S. 466 (2000) claim. Bowen asserts that the jury should have made a determination of the identity and amount of the drug involved in his offense and the United States ought to have carried its burden as to these "elements" by proof beyond a reasonable doubt.<sup>4</sup> However, the extent of the United State's rebuttal, thus far, is that in *Sustache-*

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alternative to the oath.

2 This elasticity in accepting Bowen's *pro se* submission is appropriate particularly because he will have even more restricted avenues for relief after this first petition is resolved. *See cf. Raineri v. United States*, 233 F.3d 96, 101 (1<sup>st</sup> Cir. 2000) ("In an era in which Congress has seen fit to narrow the doorway to habeas relief, fairness concerns dictate that courts take care not to apply the new law woodenly.")

3 A certificate of service on the local Office of the United States Attorney, dated October 10, 2000, is affixed to Bowen's motion to amend.

4 In this regard, Bowen's is a different claim than the defendant in *United States v. Baltas*, \_\_ F.3d \_\_, 2001 WL 1001 (1<sup>st</sup> Cir. 2001) who, along with other challenges to his conviction and sentence, unsuccessfully asserted an *Apprendi* claim in a direct appeal of his sentence. Baltas was convicted for conspiracy to possess with intention to distribute heroin, and under the applicable subsection of 21 U.S.C. § 841(b) the quantity of the Schedule I narcotic involved was not

*Rivera v. United States*, 221 F.3d 8 (1<sup>st</sup> Cir. 2000) the First Circuit foreclosed the use of *Apprendi* in all collateral challenges.

I do not read *Sustache-Rivera* as sweeping so broadly. True, the First Circuit determined that Sustache had an insurmountable hurdle even if the court construed his submission as a first, rather than a second or successive, habeas petition. However, in giving Sustache the benefit of analyzing his case with respect to the wider relief available on a first habeas petition, it dismissed his case only after review of the trial record and pre-sentencing report to see if the petition could withstand scrutiny as a first petition. *See Sustache- Rivera*, 221 F.3d at 17 (in determining, post-*Apprendi*, that the defendant was not prejudiced by the fact that the sentencing judge and not the jury determined the occurrence of serious bodily injury, an element of the carjacking offense, reviewing undisputed testimony before the jury that victims were shot at multiple times, both had been hit, with one in the abdomen, and the pre-sentence report representing that a gunshot wound had required amputation of the lower leg). Though the leeway available to Bowen under *Apprendi* may be minimal in the posture of this collateral review (following two direct appeals), at the very least the inquiry requires an examination of the trial and sentencing record to determine whether the United States can meet its burden under the “actual prejudice, harmless error test” to show that the error “did not have ‘substantial and injurious effect or influence.’” *Sustache-Rivera*, 221 F.3d at 17 –18 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)).<sup>5</sup>

Therefore, I order the government to further respond to Bowen's fourth ground, providing

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determinative of the term of imprisonment. The defendant in *United States v. Lafreniere*, \_\_ F.3d \_\_, 2001 WL 1002 (1<sup>st</sup> Cir. 2001) suffered the same *Apprendi* infirmity.

The determination of the identity of the drug may well be a moot issue in light of the decision issued by the First Circuit on Bowen's first direct appeal. *See United States v. Bowen*, 127 F.3d 9 (1<sup>st</sup> Cir. 1997) (concluding that the meaning of “hashish oil” was ambiguous prior to the amendments to the Sentencing Guidelines, effective November 1, 1995, and applying the rule of lenity to Bowen's case, requiring the District Court to re-sentence Bowen, treating the “particular, tarry substance” attributed to him as marihuana rather than hashish oil”).

<sup>5</sup> With the record before me, I cannot even determine if at trial or in the context of either of his two sentencings

supplementation to its argument and expansion of the record in light of the concerns raised above.

*See* D. Ct. R. Governing Sec. 2255 Proceedings, Rule 7. This response must be filed by February 2, 2001.

***SO ORDERED***

Dated this 10<sup>th</sup> day of January, 2001.

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Margaret J. Kravchuk  
U.S. Magistrate Judge

Offense Level (opening): 4

U.S. District Court  
District of Maine (Bangor)

CRIMINAL DOCKET FOR CASE #: 95-CR-21-ALL

USA v. TICCHIARELLI, et al

Filed: 04/11/95

Other Dkt # 1:95-m -00041  
Other Dkt # 1:95-m -00032  
Other Dkt # 1:95-m -00018

Case Assigned to: JUDGE GENE CARTER

RINALDO TICCHIARELLI (1)  
aka  
RONALDO  
aka  
WHITNEY DOREY  
defendant  
[term 11/08/96]

ROBERT C. GRANGER, ESQ.  
[term 11/08/96]  
[COR LD NTC ret]  
ROY, BEARDSLEY, WILLIAMS &  
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JOHN C. MATTES, Esq.  
[term 11/08/96]  
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1401 BRICKELL AVENUE  
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LEONARD I. SHARON  
[COR LD NTC ret]  
SHARON, LEARY & DETROY  
90 MAIN STREET  
P.O. BOX 3130  
AUBURN, ME 04212-3130  
(207) 782-3275

Defendant Assigned to: JUDGE GENE CARTER

Pending Counts:

Disposition

21:952=MI.F MARIJUANA - IMPORT  
(1sss)

AMENDED JUDGMENT: 121 months  
of imprisonment on Count 1sss  
and 60 months on Count 8sss, to  
be served concurrently, 5  
years Supervised Release and  
\$200 Special Assessment and  
Forfeiture; Original Judgment  
was 264 months of  
imprisonment on Count 1sss and  
60 months of imprisonment on  
Count 8sss to be served  
consecutively; Defendant  
remanded; 5 years supervised

release; Special Assessment  
\$200 and Forfeiture; THIRD  
AMENDED JUDGMENT: Defendant  
committed to the custody of  
the BOP to be imprisoned for a  
total term of 87 months on  
Count 1sss and 60 months on  
Count 8sss, to be served  
concurrently; 5 yrs. S/R;  
Special Assess. \$200 (has  
been satisfied); Dft remanded  
(1sss)

21:952=MI.F MARIJUANA - IMPORT  
(8sss)

AMENDED JUDGMENT: 121 months  
of imprisonment on Count 1sss  
and 60 months on Count 8sss, to  
be served concurrently, 5  
years Supervised Release and  
\$200 Special Assessment and  
Forfeiture; Original Judgment  
was 264 months of  
imprisonment on Count 1sss and  
60 months of imprisonment on  
Count 8sss to be served  
consecutively; Defendant  
remanded; 5 years supervised  
release; Special Assessment  
\$200 and Forfeiture; THIRD  
AMENDED JUDGMENT: Defendant  
committed to the custody of  
the BOP to be imprisoned for a  
total term of 87 months on  
Count 1sss and 60 months on  
Count 8sss, to be served  
concurrently; 5 yrs. S/R;  
Special Assess. \$200 (has  
been satisfied); Dft remanded  
(8sss)

21:952=MI.F MARIJUANA - IMPORT  
(10sss)

AMENDED JUDGMENT: 121 months  
of imprisonment on Count 1sss  
and 60 months on Count 8sss, to  
be served concurrently, 5  
years Supervised Release and  
\$200 Special Assessment and  
Forfeiture; Original Judgment  
was 264 months of  
imprisonment on Count 1sss and  
60 months of imprisonment on  
Count 8sss to be served  
consecutively; Defendant  
remanded; 5 years supervised  
release; Special Assessment  
\$200 and Forfeiture; THIRD  
AMENDED JUDGMENT: Defendant  
committed to the custody of  
the BOP to be imprisoned for a

total term of 87 months on  
Count 1sss and 60 months on  
Count 8sss, to be served  
concurrently; 5 yrs. S/R;  
Special Assess. \$200 (has  
been satisfied); Dft remanded  
(10sss)

Offense Level (opening): 4

Terminated Counts:

Disposition

21:841A=MD.F MARIJUANA - SELL,  
DISTRIBUTE, OR DISPENSE  
(1)

21:952=MI.F MARIJUANA - IMPORT  
(1s)

21:952=MI.F MARIJUANA - IMPORT  
(1ss)

21:841A=MD.F MARIJUANA - SELL,  
DISTRIBUTE, OR DISPENSE  
(2)

21:952=MI.F MARIJUANA - IMPORT  
(2s)

21:952=MI.F MARIJUANA - IMPORT  
(2ss - 3ss)

21:952=MI.F MARIJUANA - IMPORT  
(2sss - 3sss)

Counts 2sss through 7sss and  
count 9sss dismissed on motion  
by the Government  
(2sss - 3sss)

21:952=MI.F MARIJUANA - IMPORT  
(3s)

21:952=MI.F MARIJUANA - IMPORT  
(4s)

21:952=MI.F MARIJUANA - IMPORT  
(4ss)

21:952=MI.F MARIJUANA - IMPORT  
(4sss)

Counts 2sss through 7sss and  
count 9sss dismissed on motion  
by the Government  
(4sss)

21:952=MI.F MARIJUANA - IMPORT  
(5ss)

21:952=MI.F MARIJUANA - IMPORT  
(5sss)

Counts 2sss through 7sss and  
count 9sss dismissed on motion

by the Government  
(5sss)

21:952=MI.F MARIJUANA - IMPORT  
(6ss - 7ss)

21:952=MI.F MARIJUANA - IMPORT  
(6sss - 7sss)

Counts 2sss through 7sss and  
count 9sss dismissed on motion  
by the Government  
(6sss - 7sss)

21:952=MI.F MARIJUANA - IMPORT  
(8ss)

21:952=MI.F MARIJUANA - IMPORT  
(9ss)

21:952=MI.F MARIJUANA - IMPORT  
(9sss)

Counts 2sss through 7sss and  
count 9sss dismissed on motion  
by the Government  
(9sss)

21:952=MI.F MARIJUANA - IMPORT  
(10ss)

Offense Level (disposition): 4

DICKIE RAY CARTER (2)  
defendant  
[term 02/29/96]

CHARLES W. HODSDON, II  
[term 02/29/96]  
[COR LD NTC cja]  
P.O. BOX 1006  
BANGOR, ME 04402-1006  
945-3355

Defendant Assigned to: JUDGE GENE CARTER

Pending Counts:

Disposition

21:952=MI.F MARIJUANA - IMPORT  
(2s)

Imprisonment of 24 months  
w/credit for time served; 3  
Years Supervised Release; \$50  
Special Assessment; Deft  
remanded to custody of USM.  
(2s)

Offense Level (opening): 4

Terminated Counts:

Disposition

21:841A=MD.F MARIJUANA - SELL,  
DISTRIBUTE, OR DISPENSE  
(1)

21:952=MI.F MARIJUANA - IMPORT  
(1s)

Dismissed on motion of  
government at sentencing



(1s)

21:952=MI.F MARIJUANA - IMPORT  
(2s - 3s)

21:952=MI.F MARIJUANA - IMPORT  
(3s)

Dismissed on motion of  
government at sentencing  
(3s)

21:841A=MD.F MARIJUANA - SELL,  
DISTRIBUTE, OR DISPENSE  
(4)

21:952=MI.F MARIJUANA - IMPORT  
(4s)

Dismissed on motion of  
government at sentencing  
(4s)

21:841A=MD.F MARIJUANA - SELL,  
DISTRIBUTE, OR DISPENSE  
(10)

21:952=MI.F MARIJUANA - IMPORT  
(10s)

Dismissed upon motion of govt  
(10s)

Offense Level (disposition): 4

PHYLLIS ANN LUKER (3)  
defendant  
[term 02/29/96]

PERRY H. O'BRIAN, ESQ.  
[term 02/29/96]  
[COR LD NTC cja]  
42 COLUMBIA STREET  
BANGOR, ME 04401  
(207) 942-4697

Defendant Assigned to: JUDGE GENE CARTER

Pending Counts:

Disposition

21:952=MI.F MARIJUANA - IMPORT  
(2s)

Imprisonment of 18 months  
w/credit for time served; 3  
years Supervised Release; \$50  
Special Assessment; Deft  
remanded to custody of USM.  
(2s)

Terminated Counts:

Disposition

21:841A=MD.F MARIJUANA - SELL,  
DISTRIBUTE, OR DISPENSE  
(1)

21:952=MI.F MARIJUANA - IMPORT  
(1s)

Dismissed upon motion of Govt  
at sentencing  
(1s)

21:952=MI.F MARIJUANA - IMPORT  
(2ss - 3ss)

21:952=MI.F MARIJUANA - IMPORT (3s)	Dismissed upon motion of Govt at sentencing (3s)
21:841A=MD.F MARIJUANA - SELL, DISTRIBUTE, OR DISPENSE (4)	
21:952=MI.F MARIJUANA - IMPORT (4s)	Dismissed upon motion of Govt at sentencing (4s)
21:841A=MD.F MARIJUANA - SELL, DISTRIBUTE, OR DISPENSE (10)	
21:952=MI.F MARIJUANA - IMPORT  Offense Level (disposition): 4	Dismissed upon motion of Govt
BRADLEY OLIVER BOWEN (4) defendant [term 10/16/96]	J. BRADFORD COFFEY, ESQ. [term 10/16/96] [COR LD NTC cja] FARRELL, ROSENBLATT & RUSSELL P.O. BOX 738 BANGOR, ME 04402-0738 (207) 990-3314  BRADLEY OLIVER BOWEN [COR LD NTC] [PRO SE] FED. NO. 44342-004 2680 HIGHWAY 301 SOUTH JESUP, GA 31599
Defendant Assigned to: JUDGE D. BROCK HORNBY	
Pending Counts:	Disposition
21:952=MI.F MARIJUANA - IMPORT (1s)	235 months incarceration on counts I and VI concurrently; and 60 months on Count VII, concurrently; 4 years supervised release on Counts I and VI concurrently; and 2 years on Count VII, Concurrently; \$150.00 special assessment (1s)
21:952=MI.F MARIJUANA - IMPORT (6s - 7s)	235 months incarceration on counts I and VI concurrently; and 60 months on Count VII, concurrently; 4 years supervised release on Counts I and VI concurrently; and 2 years on Count VII, Concurrently; \$150.00 special

assessment  
(6s - 7s)

Offense Level (opening): 4

Terminated Counts:	Disposition
21:841A=MD.F MARIJUANA - SELL, DISTRIBUTE, OR DISPENSE (1)	
21:952=MI.F MARIJUANA - IMPORT (6sss - 7sss)	
21:841A=MD.F MARIJUANA - SELL, DISTRIBUTE, OR DISPENSE (10)	

Offense Level (disposition): 4

Complaints:

NONE

Case Assigned to: JUDGE GENE CARTER

DIANA PIERCE (5)	DAVID W. BATE, ESQ.
aka	[term 10/17/96]
DIANA BARBER	[COR LD NTC cja]
aka	6 STATE STREET
DEE	SUITE 403
defendant	BANGOR, ME 04401-5112
[term 10/17/96]	945-3333

Defendant Assigned to: JUDGE GENE CARTER

Pending Counts:	Disposition
21:841A=MD.F MARIJUANA - SELL, DISTRIBUTE, OR DISPENSE (1)	18 months imprisonment to be served concurrently with sentence imposed in CR-96-47-B- 02, \$50.00 Special Assessment and 5 years of Supervised Release (1)

Offense Level (opening): 4

Terminated Counts:	Disposition
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21:841A=MD.F MARIJUANA - SELL,  
DISTRIBUTE, OR DISPENSE  
(10)

Count 10 dismissed on motion by  
the Government  
(10)

Offense Level (disposition): 1

Complaints

Disposition

case Assigned to: JUDGE GENE CARTER

PHILIP DUKE (6)  
Interested Party

GARY M BAGLIEBTER, ESQ  
[COR LD NTC]  
SHUTTS & BOWEN  
201 S. Biscayne Blvd.  
1500 Miami Center  
Miami, FL 33131  
305-358-6300

Pending Counts:

NONE

Terminated Counts:

NONE

Complaints:

NONE

U. S. Attorneys:

MARGARET D. MCGAUGHEY, ESQ.  
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TIMOTHY D. WING, AUSA  
[COR]  
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[COR LD NTC]  
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945-0344